In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1136

JIMMIE SHARP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks damages totalling $2 1/2 billion under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671, *et seq.*, for the government's alleged failure to provide him compensation under the Federal Employees' Compensation Act, 5 U.S.C. 8101, *et seq.* (hereafter "F.E.C.A.") in a timely fashion.

Petitioner, a former civilian employee of the Navy, injured his back in a work-related accident in 1954. He received medical attention from a Navy doctor and, after a short period of recuperation, returned to his job, performing his former duties. In 1963 petitioner received an early disability retirement on account of an aggravation of the injuries resulting from the accident (Pet. 3-6; Pet. App. A, p.p. ii-iii). Thereafter, petitioner filed a claim for an F.E.C.A. total disability pension.

On August 19, 1971, the Department of Labor granted petitioner's F.E.C.A. claims, awarding him $64,048.00 in back compensation payments and a total disability pension (Pet. App. A, p. ii; Pet. 3-6).

In 1974, following several unsuccessful attempts to secure an award of increased compensation from the Department of Labor, petitioner brought this action in the United States District Court for the Northern District of California, seeking additional compensation in the form of damages under the Federal Tort Claims Act. The district court granted the government's motion to dismiss (Pet. App. B, p. iv), and the court of appeals affirmed (Pet. App. A).

The court of appeals correctly held that decisions of the Secretary of Labor or his designee as to payments under F.E.C.A. are final and not subject to judicial review. 5 U.S.C. 8128(b); *Soderman* v. *United States Civil Service Commission,* 313 F.2d 694 (C.A. 9), certiorari denied, 372 U.S. 968; *Cobia* v. *United States,* 384 F.2d 711 (C.A. 10), certiorari denied, 390 U.S. 986. Since the Secretary's award of compensation is not judicially reviewable, the "Federal Tort Claims Act cannot be employed by [petitioner] to circumvent this bar to judicial review" (Pet. App. A, p iii). Moreover, the liability of the United States under F.E.C.A. "with respect to the injury or death of an employee is exclusive and instead of all other liability *** under a Federal tort liability statute." 5 U.S.C. 8116(c). See, *e.g., Johansen* v. *United States,* 343 U.S. 427; *Patterson* v. *United States,* 359 U.S. 495; *United States* v. *Demko,* 385 U.S. 149.[1]

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[1]Moreover, a negligent or intentional denial of a claim for compensation benefits is not actionable under the Federal Tort Claims Act. 28 U.S.C. 2680(a), (h). See *United States* v. *Neustadt,* 366 U.S. 696; *Fitch* v. *United States,* 513 F.2d 1013 (C.A. 6), certiorari denied, 423 U.S. 866; *Dalehite* v. *United States,* 346 U.S. 15; *J.H. Rutter Rex Mfg. Co., Inc.* v. *United States,* 515 F.2d 97 (C.A. 5), certiorari denied March 8, 1976, No. 75-879.

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Petitioner contends (Pet. 8), apparently for the first time, and without citation of authority, that application of the exclusivity principle here violates the Due Process Clause of the Fifth Amendment. But due process does not require judicial review of an administrator's finding of facts or application of a concededly constitutional statute to those facts, at least where, as here, there is no claim that the administrative procedures were themselves constitutionally deficient and the administrative action involves no more than the determination of the amount of benefits to which a former employee is entitled. Cf. *Johnson* v. *Robison*, 415 U.S. 361, 366-374.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1976.